Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

JAMES P. DAVIS, QUARRY DEVELOPMENT COMPANY,
and COMMUNITY TITLE COMPANY,

Petitioners,

v.

UNITED STATES FIDELITY AND GUARANTY COMPANY
and CONCRETE HOLDING COMPANY,

Respondents.

Petition for Writ of Certiorari to
The Eighth Circuit Court of Appeals, Eastern District

PETITION FOR WRIT OF CERTIORARI

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31 pp

QUESTIONS PRESENTED FOR REVIEW

This case presents issues on appeal relevant to attempts to collect an excess insurance premium refund.

United States Fidelity and Guaranty Company (USF&G) made demand for payment of $154,000.00 in excess insurance premium refund and filed suit against Concrete Holding Company (CHC), St. Charles County Sanitary Landfill Co. and Quarry Holding Co.(QHC). USF&G's Complaint contained three counts: a) Ct. 1: Breach of Written Contract for unpaid premium; b) Ct. 2: Suit on Account; and c) Ct. 3: Quantum Meruit.

CHC filed an Amended Crossclaim and Third Party Complaint which alleged: a) Count 1: Breach of Contract and Warranty against QHC, QDC, James P. Davis (Davis) and Community Title Company (CTC); b) Count 2: Failure to provide for payment of creditors upon dissolution against QHC and Davis; c) Count 3: Breach of Fiduciary Duty against Davis and John J. Barnes (Barnes); d) Count 4: Constructive Trust against QHC, QDC, CTC and Davis; e) Count 5: Intentional Misrepresentation against Davis and QHC; f) Count 6: Negligent Misrepresentation against QHC and Davis; and g) Count 7: Conversion And Conspiracy To Covert against QHC, Davis and CTC. CHC alleged an alter ego theory of liability against Davis and CTC.

The matter proceeded to trial on January 8 1997 and, on 13 January 1997 the jury returned a verdict for USF&G and against CHC and QDC on its contract claim and for CHC and against QDC, Davis and CTC on CHC's third party claim for breach of contract. CHC, QHC, Davis, QDC and CTC moved for judgment at the close of evidence which was denied.

QHC, Davis, QDC and CTC filed a Motion For Judgment As A Matter Of Law Or Alternatively For A New Trial Or In The Alternative Judgment NOV which was denied by the trial court.

QHC, Davis, QDC and CTC filed a Notice of Appeal on 23 April 1997. USF&G filed a Notice of Appeal relevant to the court's denial of its motion for pre judgment interest. CHC filed a Notice of Appeal. Davis filed a notice of appeal over the court's denial of his motion to quash charging order.

On March 26, 1998, the United States Court of Appeals for the Eighth Circuit, handed down its opinion in the above cause, and affirmed the decision of the District Court with the exception of the court's ruling on prejudgment interest. The panel directed that the cause be remanded to the District Court with instructions to award appropriate prejudgment interest to USF&G. Petitioners' Motion for Rehearing by Panel was denied by the Eighth Circuit Court of Appeals on May 14, 1998.

The questions thereby arising are:

1) Whether the Eighth Circuit Court of Appeals, denied Fourteenth Amendment rights to substantive and procedural due process by applying a new test as to what constitutes liability of a stockholder of a corporation under the "alter ego" theory, and in not giving its decision prospective — only application to avert injustice or hardship; and whether the opinion of the Eighth Circuit Court of Appeals violates the holding of the United States Supreme Court in *New Colonial Ice Company, Inc. v. Helvering*, 292 U.S. 434, 54 S.Ct. 788, 78 L.Ed. 1348 (1934) because the decision of the Eighth Circuit Court of Appeals established a new principle of law by overruling clear past precedent; the purpose and effect of the newly announced rule will not be significantly enhanced or retarded by retrospective operation; and the balancing of interests and hardships which would result from the imposition of the court's new rule would result in substantial hardship to Petitioners.

LIST OF THE PARTIES

The parties to the proceeding before this court are:

Petitioners: James P. Davis, Community Title Company, and Quarry Development Company

Respondents: United States Fidelity & Guaranty Company, and Concrete Holding Company

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PETITION FOR WRIT OF CERTIORARI

The Petitioners, James P. Davis, Community Title Company, and Quarry Development Company, respectfully pray that a writ of certiorari issue to review the judgment and opinion of the Eighth Circuit Court of Appeals, Eastern District, entered in the above proceeding on March 26, 1998. Petitioners' Motion for Rehearing by Panel by the Eighth Circuit Court of Appeals was denied on May 14, 1998.

OPINIONS BELOW

The opinion of the District Court of the United States District Court, Eastern District, was entered on January 13, 1997, and is reprinted as Appendix C.

The opinion of the Eighth Circuit Court of Appeals, was entered on March 26, 1998, and is reprinted as Appendix B.

The order from the Eighth Circuit Court of Appeals, denying Petitioners' Motion for Rehearing by Panel was entered in May 14, 1998, and is reprinted as Appendix A.

JURISDICTION

The Petition seeks review of a decision of the Eighth Circuit Court of Appeals, wherein a Motion for Rehearing by Panel was denied on May 14, 1998. This application was submitted no later than ninety (90) days from the afforsaid date.

Jurisdiction is substantially grounded upon Petitioners' claim of denial of access to the courts and a denial of rights, privileges and immunities granted by the 14th Amendment to the United States Constitution.

Jurisdiction is invoked pursuant to 28 U.S.C. Section 1254(1) in that this Petition seeks review of a final judgment rendered by the Eighth Circuit Court of Appeals, Eastern District, after the rendition of judgment.

CONSTITUTIONAL PROVISIONS

Constitutional Provisions:

U.S. Constitution, amend. XIV, Section 1.

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

This case presents issues on appeal relevant to attempts to collect an excess insurance premium refund.

Starting in 1986 Quarry Holding Company (QHC) was formed as a Missouri corporation to purchase ready-mix concrete companies and quarry operations. The stock of QHC was owned 50% by James P. Davis and 50% by George Casey. Thereafter, QHC purchased all the shares of stock of St. Charles Quarry Company (SCQC) and Kurtz Concrete (Kurtz) in March 1987. Kurtz had between 150 and 200 employees and manufactured and sold ready mix concrete. SCQC had 50 to 75 employees, owned quarries and operated a quarry operation with rock crushers, and other heavy equipment. Robert Berkley was the Chief Executive Officer of QHC in 1987-88 and he and his staff ran the business operations of Kurtz and SCQC and other related entities. He was assisted by George Casey. Davis was a passive investor in QHC and was never involved in the day-to-day operations.

Chapman-Sanders was an independent insurance agency and was Kurtz's insurance agent prior to the purchase of its shares by QHC. Because of the change of controlling interest in Kurtz, as a result of QHC's purchase of its shares of stock, Jack Chapman,

from Chapman-Sanders, recommended that a retrospective insurance rating plan be adopted by SCQC, Kurtz and the other related entities. United States Fidelity & Guaranty (USF&G) was a corporation duly organized and existing under and by virtue of the laws of the state of Maryland. USF&G delivered to SCQC and its related entities, three year policies of insurance with the initial policy period of 1 January 1987 to 1 January 1988; worker's compensation policy, business automobile policy and Master Policy. QHC was not a named insured on these policies. Renewal policies were issued for the policy period 1 January 1988 through 1 January 1989. QHC was a named insured on these policies. The Declaration Page of the worker's compensation policy for the policy period 1 January 1987 through 1 January 1988 did not list the retrospective endorsement on its declaration page a fact admitted to by USF&G at trial.

It was the custom and practice of USF&G to periodically audit the books of their insured in order to adjust the amounts of premiums due under the policies. Heidi Milner audited the books of SCQC, Kurtz and the other related entities (the "Insureds") and arrived at a net payroll figure of $7,000,000.00. Under the terms of the retrospective rating plan for the insureds, that payroll would have generated an earned premium of $340,588.00. Due to a failure of communication between USF&G's auditors in St. Louis, and its billing department in Maryland, USF&G mistakenly credited the Insureds with payment of the $340,588.00 figure when, in fact, the Insureds had paid only $213,233.00. This resulted in a mistaken over credit of additional premium paid by the Insureds of $127,355.00. The adjustment was delivered to the Commercial Lines Department of USF&G who were supposed to research and verify its accuracy, but failed to do so. The policies of insurance were cancelled on 13 April 1988. During both policy periods, total premiums paid to USF&G amounted to $361,519.00.

A return premium of $264,099.00 was mistakenly computed by USF&G and a check in that amount, dated 13 March 1989 and payable to SCQC, was prepared and delivered to Jack Chapman at Chapman-Sanders Insurance Agency. USF&G instructed Chapman not to deliver the check until a notice of retrospective election, evidencing the insureds acceptance of the retrospective insurance plan, was signed. This document was signed one year after the policies were cancelled. When Jack Chapman received the $264,099.00 premium refund check from USF&G, and had obtained the execution of the retrospective plan amendment, he called SCQC in St. Charles to determine to whom the check should be sent and was directed to send the check to QHC at its offices on Jacobs Old Coal Road. Tom Moorehead, the CFO of QHC deposited the check to QHC's account at First Capital Bank and used the sums to pay obligations of QHC. Part of those payments involved a payment of $100,000.00 to CTC, by check, on 10 April 1989. The check was endorsed by Dale Schwartz, the Comptroller of QHC. The refund check was deposited in QHC's account on 31 March 1989.

If properly computed, the refund to the Insureds should have been $73,919.00 and not the $264,099.00 amount actually paid. In other words, as of the date of policy cancellation on 13 April 1988, no premiums were due to USF&G by SCQC, Kurtz or its related entities, the Insureds, but for USF&G's billing error, a fact admitted to at trial by USF&G. But for USF&G's error in calculation, there was no "additional (premium) due" on final audit, only a refund.

In 1987 Berkley and Casey went to Des Moines, Iowa and met with Missouri Portland Cement. Missouri Portland Cement expressed an interest in purchasing QHC's shares of stock in SCQC and Kurtz. To that end, Concrete Holding Company, a Missouri corporation, (CHC) was formed to accomplish that purpose. The shares of stock of CHC were owned 80% Missouri Portland Cement (MPC), 10% Davis and 10% Casey.

Commencing in 1987, Bill Kyle, an employee of MPC, spent months at the offices of QHC investigating the financial affairs of the concrete and quarry operations before the purchase. Part of what Kyle examined was the insurance matters of QHC. This due diligence commenced in 1987 immediately after Berkley and Casey's initial contact with MPC. This due diligence conducted by MPC was one of the most "extensive due diligence reports" that Berkley had ever seen and included insurance matters. Some of this due diligence was done by Mike Riley, MPC's attorney. All information requested by either Kyle, Kelly or MPC was provided.

The retrospective policies were cancelled in April 1988 at the suggestion of the MPC insurance department in Des Moines, Iowa.

Davis had no role in the preparation of the documents, never provided any information relevant to the due diligence examination by Missouri Portland Cement prior to purchase, and relied on his lawyers, accountants and others to ensure the accuracy of the statements made in the sale documents.

The sale of the shares of stock of Kurtz and SCQC closed on 31 October 1988. Thereafter, CHC continued to be owned 80% by Missouri Portland Cement, 10% Davis and 10% Casey. Prior to the sale there were interlocking directorships among SCQC and CHC.

As of 14 March 1991, neither USF&G nor anyone else, had discovered the error in the computation of premium nor of the excess refund. The purchase price of the shares was based on the corporate worth of SCQC which was determined based upon the Income Statement and Balance Sheet of SCQC. Schedule 1, to Trial Exhibit C was the Balance Sheet and Income Statement of SCQC. That Balance Sheet did not show a premium refund due from any insurance company to SCQC and, if it had, it would have increased the purchase price by a similar amount.

Not all of the assets of SCQC were sold as part of the Stock Purchase Agreement but, rather, 500 acres of real estate (comprised of quarry property) was left in QHC. Asphalt Concrete Company, an asphalt manufacturer and contractor, was merged into QHC in 1990 increasing QHC assets by approximately $5,000,000.00. The 500 acres of property was worth approximately $2,500,000.00, all of which was in QHC in 1990. QHC continued to operate the asphalt and quarry company after the sale of stock and Robert Berkley was the Chief Operating Officer during that period of time with offices at Jacobs Old Coal Road in St. Louis, Missouri.

In March 1991, USF&G discovered the mistake made in the calculation of the premium refund. This was the first time anyone knew of any over payment.

In April 1991, an agreement and plan of reorganization was entered into and executed by QHC wherein QHC was dissolved on 30 June 1991 as part of the restructuring of the corporation done by the attorneys and accountants for CTC. After the Plan was executed, approximately $4-5,000,000.00 of assets remained in Quarry Development Company, a Missouri corporation (QDC) organized as part of the reorganization plan.

In April 1991, after the reorganization, QDC had assets comprised of the asphalt and equipment company worth $1,000,000.00 and 150 employees and continued to operate as a going concern with substantial assets. The assets of QDC (the quarry and asphalt producer and contractor) were eventually sold as a going business. All the assets of QHC and QDC ended up in the hands of their creditors.

USF&G made demand for payment of $154,000.00 in excess refund and filed suit against CHC, St.Charles County Sanitary Landfill Co. and QHC, on 4 November. USF&G's Complaint contained three counts: a) Ct. 1: Breach of Written Contract for

unpaid premium; b) Ct. 2: Suit on Account; and c) Ct. 3: Quantum Meruit.

CHC filed an Amended Crossclaim and Third Party Complaint which alleged: a) Count 1: Breach of Contract and Warranty against QHC, QDC, Davis and CTC; b) Count 2: Failure to provide for payment of creditors upon dissolution against QHC and Davis; c) Count 3: Breach of Fiduciary Duty against Davis, Barnes; d) Count 4: Constructive Trust against QHC, QDC, CTC and Davis; e) Count 5: Intentional Misrepresentation against Davis and QHC; f) Count 6: Negligent Misrepresentation against QHC and Davis; and g) Count 7: Conversion And Conspiracy To Covert against QHC, Davis and CTC. CHC alleged an alter ego theory of liability against Davis and CTC.

The matter proceeded to trial on January 8 1997 and, on 13 January 1997 the jury returned a verdict for USF&G and against CHC and QDC on its contract claim and for CHC and against QDC, Davis and CTC on CHC's third party claim for breach of contract. CHC, QHC, Davis, QDC and CTC moved for judgment at the close of evidence which was denied.

QHC, Davis, QDC and CTC filed a Motion For Judgment As A Matter Of Law Or Alternatively For A New Trial Or In The Alternative Judgment NOV which was denied by the trial court. QHC, Davis, QDC and CTC filed a Notice of Appeal on 23 April 1997. USF&G filed a Notice of Appeal relevant to the court's denial of its motion for prejudgment interest. CHC filed a Notice of Appeal. Davis filed a notice of appeal over the court's denial of his motion to quash charging order.

On March 26, 1998, the Eighth Circuit Court of Appeals, Eastern District, handed down its opinion in the above cause, and affirmed the decision of the district court with the exception of the court's ruling on prejudgment interest. The panel directed that the cause be remanded to the district court with instructions to award appropriate prejudgment interest to USF&G. Petition-

ers' Motion for Rehearing by Panel was denied by the eighth Circuit Court of Appeals on May 14, 1998.

Petitioners now submit their petition for writ of certiorari to the United States Supreme Court for proper review of their case.

REASONS FOR GRANTING THE WRIT

1) **Whether the Eighth Circuit Court of Appeals, Eastern District, denied Fourteenth Amendment rights to substantive and procedural due process by applying a new test as to what constitutes liability of a stockholder of a coporation under the "alter ego" theory, and in not giving its decision prospective-only application to avert injustice or hardship; and whether the opinion of the Eighth Circuit Court of Appeals violates the holding of the United States Supreme Court in *New Colonial Ice Company, Inc. v. Helvering*, 292 U.S. 434, 54 S.Ct. 788, 78 L.Ed. 1348 (1934) because the decision of the Eighth Circuit Court of Appeals established a new principle of law by overruling clear past precedent; the purpose and effect of the newly announced rule will not be significantly enhanced or retarded by retrospective operation; and the balancing of interests and hardships which would result from the imposition of the court's new rule would result in substantial hardship to Petitioners.**

In the present case, the Eighth Circuit Court of Appeals, has effectively adopted a new test as to what evidentiary burden a plaintiff must overcome in order to pierce the corporate veil under the "alter ego" theory and hold a shareholder of a corporation personally liable for the debts of the corporation. The court has unjustly failed to grant Petitioners' Motion For Judgment As A Matter Of Law Or Alternatively For A New Trial Or In The Alternative Judgment NOV, because CHC failed to

adduce substantial evidence to pierce the corporate veil and hold Davis, CTC, and QDC personally liable for the debts of QHC.

Specifically, CHC claims it properly pierced the corporate veil by showing that QHC transferred its assets to QDC and CTC to avoid its creditors

In Missouri, the law with respect to piercing the corporate veil is set forth in *Collet v. American National Stores, Inc.*, 708 S.W.2d 273 (Mo.App. 1986), which holds that courts would pierce the corporate veil or disregard the corporate entity once a plaintiff shows:

> Control, not mere majority or complete stock control, but complete domination, not only of finances, but of policy and business practice in respect to the transaction attacked, so that the corporate entity as to this transaction had at the time, no separate mind, will or existence of its own.

Similarly, the United States Supreme Court has held that a corporation and its stockholders are separate entities. *New Colonial Ice Co. v. Helvering*, 292 U.S. 442, 54 S.Ct. 788, 78 L.Ed. 1348 (1934). Further, that the separate identities may be disregarded only in exceptional situations where it would otherwise present an obstacle to the due protection or enforcement of public or private rights. *Id.* Stated another way, full ownership, with concomitant dominance and control, is insufficient to justify piercing the corporate veil; rather, a plaintiff must prove that equity requires that the parent and the subsidiary be treated as one. *A.L. Laboratories, Inc. v. Philips Roxane, Inc.*, 803 F.2d 378, 385 (8th Cir. 1986).

In the instant case, the Eighth Circuit Court of Appeals violated the holdings of *New Colonial Ice, Co.*, *A.L. Laboratories, Inc.*, and *Collet* by holding that Davis' mere status as a stockholder of QHC, CTC, and QDC subjected him to personal liability on CHC's claim against QHC.

The record is devoid of any evidence that CTC, QDC, QHC, or Davis had other than a lawful purpose in taking the actions which CHC claims constituted the basis for piercing the corporate veil. This is further emphasized by the fact that CHC can not point to any evidence in the record which shows that CTC, QDC, or Davis were attempting to perpetrate a fraud. In fact, the plan of reorganization was implemented pursuant to §355.090(14) RSMo. 1953 (now repealed) which granted Missouri corporations the right to cease activities and surrender its corporate franchise and which statutorily authorized the reorganization mechanism employed by QDC and was legal under the United States Internal Revenue Code 26 U.S.C. §368(a)(1)(c) and §368(a)(2)(c). All of the planning and actions relevant to the plan of reorganization took place prior to the claim of USF&G ripening into a lawsuit. Therefore, CHC has not presented any evidence or explained how conduct specifically authorized by Missouri and Federal statutes constitutes illegal or fraudulent activity and justifies piercing the corporate veil.

CONCLUSION

For the foregoing reasons, Petitioners ask this Court to grant their Petition for Writ of Certiorari and reverse the decision of the United States Court of Appeals, Eighth Circuit.

Respectfully submitted,

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Counsel for Petitioners

APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
THE EIGHTH CIRCUIT

No. 97-2402EM

United States Fidelity and Guaranty Company, a corporation,

Plaintiff-Appellee,

v.

Concrete Holding Company, formerly known as St. Charles Quarry Company, doing business as Defiance Quarry, doing business as Kurtz Concrete, Inc., doing business as Goellner Redi-Mix, Inc., a corporation, St. Charles County Sanitary Landfill, Inc., an administratively-dissolved corporation;

Defendant-Appellees,

Quarry Holding Company,
a voluntarily-dissolved corporation,

Defendant-Appellant,

v.

John J. Barnes, Jr.; Quarry Holding Company;

Third-Party Defendants,

John J. Barnes, Jr.; Quarry Holding Company, James P. Davis; Quarry Development Company;
Community Title Company,

Cross-Defendants,

Concrete Holding Company,

Third-Party Plaintiff-Appellee,

v.

James P. Davis, individually, and as statutory and common law trustee for for Defendant Quarry Holding Company; Quarry Development Company; Community Title Company,

Third-party Defendants-Appellants.

No. 97-2405EM

United States Fidelity and Guaranty Company, a corporation,

Plaintiff-Appellee,

v.

Concrete Holding Company, formerly known as St. Charles Quarry Company, doing business as Defiance Quarry, doing business as Kurtz Concrete, Inc., doing business as Goellner Redi-Mix, Inc., a corporation, St. Charles County Sanitary Landfill, Inc., an administratively-dissolved corporation;

Defendant-Appellees,

Quarry Holding Company
a voluntarily-dissolved corporation,

Defendant-Appellant,

v.

John J. Barnes, Jr.; Quarry Holding Company;

Third-Party Defendants,

John J. Barnes, Jr.; Quarry Holding Company, James P. Davis; Quarry Development Company; Community Title Company,

Cross-Defendants,

Concrete Holding Company,

Third-Party Plaintiff-Appellee,

v.

James P. Davis, individually, and as statutory and common law trustee for for Defendant Quarry Holding Company; Quarry Development Company; Community Title Company,

Third-party Defendants-Appellants.

No. 97-2408EM

United States Fidelity and Guaranty Company, a corporation,

Plaintiff-Appellee,

v.

Concrete Holding Company, formerly known as St. Charles Quarry Company, doing business as Defiance Quarry, doing business as Kurtz Concrete, Inc., doing business as Goellner Redi-Mix, Inc., a corporation, St. Charles County Sanitary Landfill, Inc., an administratively-dissolved corporation;

Defendant-Appellees,

Quarry Holding Company,
a voluntarily-dissolved corporation,

Defendant-Appellant,

v.

John J. Barnes, Jr.; Quarry Holding Company;

Third-Party Defendants,

John J. Barnes, Jr.; Quarry Holding Company, James P. Davis; Quarry Development Company
Community Title Company,

Cross-Defendants,

Concrete Holding Company,

Third-Party Plaintiff-Appellee,

v.

James P. Davis, individually, and as statutory and common law trustee for for Defendant Quarry Holding Company; Quarry Development Company; Community Title Company,

Third-party Defendants-Appellants.

No. 97-2763EM

United States Fidelity and Guaranty Company, a corporation,

Plaintiff-Appellee,

v.

Concrete Holding Company, formerly known as St. Charles Quarry Company, doing business as Defiance Quarry, doing business as Kurtz Concrete, Inc., doing business as Goellner Redi-Mix, Inc., a corporation, St. Charles County Sanitary Landfill, Inc., an administratively-dissolved corporation;

Defendant-Appellees,

Quarry Holding Company,
a voluntarily-dissolved corporation,

Defendant-Appellant,

v.

John J. Barnes, Jr.; Quarry Holding Company;

Third-Party Defendants,

John J. Barnes, Jr.; Quarry Holding Company, James P. Davis; Quarry Development Company;
Community Title Company,

Cross-Defendants,

Concrete Holding Company,

Third-Party Plaintiff-Appellee,

v.

James P. Davis, individually, and as statutory and common law trustee for for Defendant Quarry Holding Company; Quarry Development Company; Community Title Company,

Third-party Defendants-Appellants.

No. 97-3512EM

United States Fidelity and Guaranty Company, a corporation,

Plaintiff-Appellee,

v.

Concrete Holding Company, formerly known as St. Charles Quarry Company, doing business as Defiance Quarry, doing business as Kurtz Concrete, Inc., doing business as Goellner Redi-Mix, Inc., a corporation, St. Charles County Sanitary Landfill, Inc., an administratively-dissolved corporation;

Defendant-Appellees,

Quarry Holding Company,
a voluntarily-dissolved corporation,

Defendant-Appellant,

v.

John J. Barnes, Jr.; Quarry Holding Company;

Third-Party Defendants,

John J. Barnes, Jr.; Quarry Holding Company, James P. Davis; Quarry Development Company; Community Title Company,

Cross-Defendants,

Concrete Holding Company,

Third-Party Plaintiff-Appellee,

v.

James P. Davis, individually, and as statutory and common law trustee for for Defendant Quarry Holding Company; Quarry Development Company; Community Title Company,

Third-party Defendants-Appellants.

Appeals from the United States District Court
for the Eastern District of Missouri

The petitions for rehearing filed by the appellants and appellee have been considered by the court and are denied.

May 14, 1998

Order Entered at the Direction of the Court:

Michael E. Gans

Clerk, U.S. Court of Appeals, Eighth Circuit.

APPENDIX B

UNITED STATES COURT OF APPEALS
THE EIGHTH CIRCUIT

No. 97-2402EM

United States Fidelity and Guaranty Company, a corporation,

Plaintiff-Appellee,

v.

Concrete Holding Company, formerly known as St. Charles Quarry Company, doing business as Defiance Quarry, doing business as Kurtz Concrete, Inc., doing business as Goellner Redi-Mix, Inc., a corporation, St. Charles County Sanitary Landfill, Inc., an administratively-dissolved corporation;

Defendant-Appellees,

Quarry Holding Company,
a voluntarily-dissolved corporation,

Defendant-Appellant,

v.

John J. Barnes, Jr.; Quarry Holding Company;

Third-Party Defendants,

John J. Barnes, Jr.; Quarry Holding Company, James P. Davis; Quarry Development Company; Community Title Company,

Cross-Defendants,

Concrete Holding Company,

Third-Party Plaintiff-Appellee,

v.

James P. Davis, individually, and as statutory and common law trustee for for Defendant Quarry Holding Company; Quarry Development Company; Community Title Company,

Third-party Defendants-Appellants.

No. 97-2405EM

United States Fidelity and Guaranty Company, a corporation,

Plaintiff-Appellee,

v.

Concrete Holding Company, formerly known as St. Charles Quarry Company, doing business as Defiance Quarry, doing business as Kurtz Concrete, Inc., doing business as Goellner Redi-Mix, Inc., a corporation, St. Charles County Sanitary Landfill, Inc., an administratively-dissolved corporation;

Defendant-Appellees,

Quarry Holding Company
a voluntarily-dissolved corporation,

Defendant-Appellant,

v.

John J. Barnes, Jr.; Quarry Holding Company;

Third-Party Defendants,

John J. Barnes, Jr.; Quarry Holding Company, James P. Davis; Quarry Development Company; Community Title Company,

Cross-Defendants,

Concrete Holding Company,

Third-Party Plaintiff-Appellee,

v.

James P. Davis, individually, and as statutory and common law trustee for for Defendant Quarry Holding Company; Quarry Development Company; Community Title Company,

Third-party Defendants-Appellants.

No. 97-2408EM

United States Fidelity and Guaranty Company, a corporation,

Plaintiff-Appellee,

v.

Concrete Holding Company, formerly known as St. Charles Quarry Company, doing business as Defiance Quarry, doing business as Kurtz Concrete, Inc., doing business as Goellner Redi-Mix, Inc., a corporation, St. Charles County Sanitary Landfill, Inc., an administratively-dissolved corporation;

Defendant-Appellees,

Quarry Holding Company,
a voluntarily-dissolved corporation,

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Third-Party Defendants,

John J. Barnes, Jr.; Quarry Holding Company, James P. Davis; Quarry Development Company
Community Title Company,

Cross-Defendants,

Concrete Holding Company,

Third-Party Plaintiff-Appellee,

v.

James P. Davis, individually, and as statutory and common law trustee for for Defendant Quarry Holding Company; Quarry Development Company; Community Title Company,

Third-party Defendants-Appellants.

No. 97-2763EM

United States Fidelity and Guaranty Company, a corporation,

Plaintiff-Appellee,

v.

Concrete Holding Company, formerly known as St. Charles Quarry Company, doing business as Defiance Quarry, doing business as Kurtz Concrete, Inc., doing business as Goellner Redi-Mix, Inc., a corporation, St. Charles County Sanitary Landfill, Inc., an administratively-dissolved corporation;

Defendant-Appellees,

Quarry Holding Company,
a voluntarily-dissolved corporation,

Defendant-Appellant,

v.

John J. Barnes, Jr.; Quarry Holding Company;

Third-Party Defendants,

John J. Barnes, Jr.; Quarry Holding Company, James P. Davis; Quarry Development Company; Community Title Company,

Cross-Defendants,

Concrete Holding Company,

Third-Party Plaintiff-Appellee,

v.

James P. Davis, individually, and as statutory and common law trustee for for Defendant Quarry Holding Company; Quarry Development Company; Community Title Company,

Third-party Defendants-Appellants.

No. 97-3512EM

United States Fidelity and Guaranty Company, a corporation,

Plaintiff-Appellee,

v.

Concrete Holding Company, formerly known as St. Charles Quarry Company, doing business as Defiance Quarry, doing business as Kurtz Concrete, Inc., doing business as Goellner Redi-Mix, Inc., a corporation, St. Charles County Sanitary Landfill, Inc., an administratively-dissolved corporation;

Defendant-Appellees,

Quarry Holding Company,
a voluntarily-dissolved corporation,

Defendant-Appellant,

v.

John J. Barnes, Jr.; Quarry Holding Company;

Third-Party Defendants,

John J. Barnes, Jr.; Quarry Holding Company, James P. Davis; Quarry Development Company; Community Title Company,

Cross-Defendants,

Concrete Holding Company,

Third-Party Plaintiff-Appellee,

v.

James P. Davis, individually, and as statutory and common law trustee for for Defendant Quarry Holding Company; Quarry Development Company; Community Title Company,

Third-party Defendants-Appellants.

Appeals from the United States District Court
for the Eastern District of Missouri

JUDGMENT

These appeals from the United States District Court were submitted on the records of the district court, briefs of the parties and were argued by counsel.

After consideration, it is hereby ordered and adjudged that the judgments of the district court in these causes are affirmed and the causes are remanded to the district court for proceedings consistent with the opinion of this court.

March 26, 1998

A true copy.

ATTEST: Michael E. Gans

Clerk, U.S. Court of Appeals, Eighth Circuit

APPENDIX C

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI

CASE NUMBER: 4:92CV2218 CDP

UNITED STATES FIDELITY
AND GUARANTY COMPANY,

Plaintiff/Counterclaim Defendant,

v.

CONCRETE HOLDING COMPANY,

Defendant/Counterclaim
Plaintiff/Cross Claim Plaintiff/Third-Party Plaintiff,

and

QUARRY HOLDING COMPANY,

Defendant/Crossclaim Defendant.

CONCRETE HOLDING COMPANY,

Third-Party Plaintiff,

vs.

COMMUNITY TITLE COMPANY,
QUARRY DEVELOPMENT COMPANY,
AND JAMES P. DAVIS,

Third-Party Defendants.

X Jury Verdict. This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

IT IS HEREBY ORDERED AND ADJUDGED that Judgment on plaintiff United States Fidelity and Guaranty Company's claim for breach of contract is hereby entered in favor of plaintiff and against defendants Concrete Holding Company and Quarry Holding Company jointly and severally in the amount of

$156,361.00 together with post-judgment interest at the rate of 5.615. Plaintiff United States Fidelity and Guaranty's costs are assessed against defendants Concrete Holding Company and Quarry Holding Company.

IT IS FURTHER ORDERED AND ADJUDGED that judgment on the counterclaim of counterclaim plaintiff Concrete Holding Company is entered in favor of counterclaim defendant United States Fidelity and Guaranty and against counterclaim defendant Concrete Holding Company. Counterclaim defendant United States Fidelity and Guaranty's costs are assessed to counterclaim plaintiff Concrete Holding Company.

IT IS FURTHER ORDERED AND ADJUDGED judgment on the crossclaim of crossclaim plaintiff Concrete Holding Company is entered in favor of crossclaim plaintiff Concrete Holding Company against crossclaim defendant Quarry Holding Company in the amount of $156,361.00 together with post-judgment interest at the rate of 5.61%. Crossclaim plaintiff's costs are assessed to crossclaim defendant Quarry Holding Company.

IT IS FINALLY ORDERED AND ADJUDGED that judgment on the third-party complaint of third-party plaintiff Concrete Holding Company is entered in favor of third-party plaintiff Concrete Holding Company and against third-party defendants Community Title Company, Quarry Development Company and James P. Davis. Third-party plaintiff Concrete Holding Company's costs are assessed to third-party defendants Community Title Company, Quarry Development Company and James P. Davis.

Robert D. St. Vrain

January 13, 1997
DATE

By: Laura S. Dreon
DEPUTY CLERK